Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

SUSAN JINKS,

Petitioner,

v.

RICHLAND COUNTY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal supplemental jurisdiction statute includes a provision, 28 U.S.C. § 1367(d), that tolls the period of limitations for supplemental claims while they are pending in federal court and for 30 days after they are dismissed. The question presented is whether the tolling provision invades state sovereignty in violation of the Tenth Amendment and the Necessary and Proper Clause.

PARTIES TO THE PROCEEDINGS

Petitioner is Susan Jinks. Respondent is Richland County.

STATEMENT UNDER RULE 29.4(b)

Because the proceeding draws into question the constitutionality of 28 U.S.C. § 1367(d), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, 28 U.S.C. § 2403(a) is applicable.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

STATEMENT UNDER RULE 29.4(b) iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (SEE APPENDIX F) 2

INTRODUCTION 2

REASONS FOR GRANTING THE PETITION 5

I. THIS CASE SATISFIES SEVERAL KEY CONSIDERATIONS THAT GUIDE THIS COURT'S DISCRETION TO GRANT CERTIORARI 5

A. A State Supreme Court Has Invalidated a Federal Statute on Federal Constitutional Grounds 6

B. The Decision below Conflicts with Decisions of Other Courts 6

C. The Issue Presented is Recurring and of Great Practical Significance 8

D. South Carolina's Reasoning Would Override All Federal Authority to Stay State Court Proceedings 10

II. THE DECISION BELOW IS INCORRECT 13

A. Enactment of the Tolling Provision Is Within Congress's Constitutional Authority 13

B. Section 1367(d) Violates Neither the Necessary and Proper Clause nor the Tenth Amendment 19

C. The Tolling Provision Prevents Discrimination Against a Federal Right 26

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Ableman v. Booth, 62 U.S. 506 (1858) 25
Alden v. Maine, 527 U.S. 706 (1999) 4, 25
Arizona v. Evans, 514 U.S. 1 (1995) 6
Armstrong v. Manzo, 380 U.S. 545 (1965) 19
Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067 (2d Cir. 1993) 11
Beck v. Prupis, 162 F.3d 1090 (11th Cir. 1998) 7-8, 9, 17
Blinn Florida Dep't of Transp., 781 So. 2d 1103 (Fla. 1st DCA 2000) 7 n.2
Bowen v. City of New York, 476 U.S. 467 (1986) 13
Brandenburg v. Housing Auth. of Irvine, 253 F.3d 891 (6th Cir. 2001) 16
Brewer v. City of El Cerrito, 666 F. Supp. 1346 (N.D. Cal. 1987) 17
Brickley v. United States (In re Brickley), 70 B.R. 113 (9th Cir. BAP 1986) 11
Brown v. City of Boston, 98 F.3d 1333, 1996 WL 590553 (1st Cir. 1996)(unpublished) 7-8
Burnett v. New York Cent. R.R., 380 U.S. 424 (1965) 24
Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988) 9-10, 17, 21
Carr v. CIGNA Sec., Inc., 95 F.3d 544 (7th Cir. 1996) 16
Christopher v. Harbury, 122 S.Ct. 2179 (2002) 19
City of Los Angeles v. Superior Court, 149 Cal. Rptr. 320, 85 Cal. App. 3d 143 (Ct. App. 2d Dist. 1978) 16 n.5
Conroy v. Aniskoff, 507 U.S. 511 (1993) 12
Davis v. Wechsler, 263 U.S. 22 (1923) 26-27
Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131 (9th Cir. 2001) 13
Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359 (1952) 26-27
Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) 17

Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 48 F.3d 1260 (D.C. Cir. 1995) 10
Edwards v. Okaloosa County, 5 F.3d 1431 (11th Cir. 1993) 8-9, 17
Estate of Fennell ex rel. Fennell v. Stephenson, 137 N.C. App. 430, 528 S.E.2d 911 (N.C. App. 2000), *rev'd in part*, 354 N.C. 327, 554 S.E.2d 629 (N.C. 2001) 7
Financial General Bankshares, Inc. v. Metzger, 680 F.2d 768 (D.C. Cir. 1982) 17
Finley v. United States, 490 U.S. 545 (1989) 14 n.4, 14-15
Franklin v. Zain, 152 F.3d 783 (8th Cir. 1998) 7
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 20
Graham v. Joh Deere Co., 383 U.S. 1 (1966) 20
Harkins Amusement Enterprises, Inc. v. Harry Nace Co., 657 F. Supp. 1037 (D. Ariz. 1987) 17
Hauser v. Mealey, 263 N.W.2d 803 (Minn. 1978) 16 n.5
Hedges v. Musco, 204 F.3d 109 (3d Cir. 2000) 7-8, 24-25
Henson v. Columbus Bank & Trust Co., 651 F.2d 320 (5th Cir. 1981) 8-9, 17, 18
Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n, 362 S.E.2d 176 (S.C. 1987) 16
Honda v. Clark, 386 U.S. 484 (1967) 13
Howlett v. Rose, 496 U.S. 356 (1990) 26
In re DiCamillo, 186 B.R. 59 (E.D. Pa. 1995) 11
Independent Union of Flight Attendants v. Pan American World Airways, Inc., 966 F.2d 457 (9th Cir. 1992) 11
International Games, Inc. v. Sims, 444 N.E.2d 736 (1982) .. 16 n.5
James v. Kentucky, 466 U.S. 341 (1984) 26
Jinks v. McCaulley, 163 F.3d 598 (4th Cir. 1998) 3, 4
Jinks v. Richland County, 563 S.E.2d 104 (S.C. 2002) ..... *passim*
L.A. Draper & Son, Inc., v. Wheelabrator-Frye, Inc., 454 So. 2d 506 (Ala. 1984) 16 n.5, 17
Lee v. Kemna, 534 U.S. 362, 122 S.Ct. 877 (2002) 26-27
Lynn v. City of Jackson, 63 S.W.3d 332 (Tenn. 2001) 7 n.1
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 19
Mathews v. Eldridge, 424 U.S. 319 (1976) 19
McCall v. Batson, 329 S.E.2d 741 (S.C. 1985) 22 n.6

McLaughlin v. Campbell, 410 F. Supp. 1321 (D. Mass. 1976) 9, 18
Minnesota v. National Tea Co., 309 U.S. 551 (1940) 6
Moates v. Bobb, 470 S.E.2d 402 (S.C. Ct. App. 1996) 24
Moriarty v. Garden Sanctuary Church of God, 534 S.E.2d 672 (S.C. 2000). 24
Murphy v. John Hofman Co., 211 U.S. 562 (1909) 14 n.3
Nash v. Florida Industrial Comm'n, 389 U.S. 235 (1967) 26
Neal v. District of Columbia, 131 F.3d 172 (D.C. Cir. 1997) 7-8
Nebraska Press Ass'n v. Stuart, 423 U.S. 1327 (1975) 13
Newman v. Burgin, 930 F. 2d 955 (1st Cir. 1991) 17
O'Brien v. Continental Ill. Nat'l Bank & Trust Co., 593 F.2d 54 (7th Cir. 1979) 8-9, 17
Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944) 8, 23-24
Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) 14
Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 14 n.3
Pointer v. Western Heights Independent School Dist., 919 P.2d 5 (Okla. 1996) 7
Raygor v. Regents of the University of Minnesota, 534 U.S. 533, 122 S.Ct. 999 (2002) 2
Rheaume v. Texas Dep't of Public Safety, 666 F.2d 925 (5th Cir. 1982) 9, 18
Roco Carriers, Ltd. v. M/V Nurnberg Express, 899 F.2d 1292 (2d Cir. 1990) 14 n.4
Seabrook v. Jacobson, 153 F.3d 70 (2d Cir. 1998) 8
Stevens v. ARCO Management of Washington D.C., Inc., 751 A.2d 995 (D.C. Ct. App. 2000) 7
Strachman v. Palmer, 177 F.2d 427 (1st Cir. 1949) 16
U.S. Industries, Inc. v. Blake Construction Co., 671 F.2d 539 (D.C. Cir. 1981) 9, 18
United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 9, 14, 16, 24
Wood v. DeWeese, 305 F. Supp. 939 (W.D. Ky. 1969) 12
Yakus v. United States, 321 U.S. 414 (1944) 20

Younger v. Harris, 401 U.S. 37 (1971) 18, 21

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, sec. 8, cl. 18 ..... *passim*
U.S. Const. art. III 14, 21, 25
U.S. Const. art. VI, cl. 2 25
U.S. Const. amend. V 9, 19, 27
U.S. Const. amend. X ..... *passim*
U.S. Const. amend. XIV 27

STATUTES

11 U.S.C. § 108(c) 11
11 U.S.C. § 362 11
11 U.S.C. § 362(a) 11
28 U.S.C. § 1367(c)(3). 4
28 U.S.C. § 1367(d) ..... *passim*
42 U.S.C. § 1983 ..... 3, 6
Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9658 12
Government Tort Liability Act, Tenn. Code Ann. §§ 29-20-201 *et seq.* 7 n.1
Judicial Improvements Act. Pub. L. No. 101-650, 104 Stat. 5089 (1990) 15
Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 525 (1994 ed.) 12
South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.* (Supp. 2001). 3, 22 n.6
Y2K Act, 15 U.S.C. § 6606(e)(4) 12

RULES

S. Ct. Rule 10(b) 6
S. Ct. Rule 10(c) 6

OTHER AUTHORITIES

ALI, Study of the Division of Jurisdiction Between State and Federal Courts ix (1969) 15
Federal Courts Study Committee Implementation Act of 1990, 104 Stat. 5104 (1990) 15

Federal Study Committee, Report of the Federal Courts Study Committee (Apr. & Jul. 1990) 15
Oakley, John B., *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855 (1998). 10
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Petition for a Writ of Certiorari to the Supreme Court of South Carolina

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PETITION FOR A WRIT OF CERTIORARI

Susan Jinks respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina in this case.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court (App. A, *infra*, 2a-10a) is reported at 563 S.E.2d 104. The judgment of the South Carolina Court of Common Pleas (App. B, *infra*, 11a-12a) is unreported. The opinion of the U.S. Court of Appeals for the Fourth Circuit (App. C, *infra*, 13a-20a) is reported at 163 F.3d 598 (table)(per curiam)(unpublished). The Order of the United States District Court for South Carolina (App. D, *infra*, 21a-22a) is unpublished.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered April 22, 2002. App. A, 2a. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (SEE APPENDIX F)

The relevant provisions of the Necessary and Proper Clause, the Supremacy Clause, the Third Article, the Fifth Amendment, the Tenth Amendment, and the Fourteenth Amendment to the United States Constitution are reproduced at App. F, *infra*, 26a.

28 U.S.C. § 1367 is reproduced at App. F, *infra*, 28a.

The relevant provision of the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.* (Supp. 2001) is reproduced at App. F, *infra*, 30a.

INTRODUCTION

In *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 122 S.Ct. 999 (2002), this Court held that the tolling provision, 28 U.S.C. § 1367(d), that is part of the federal supplemental jurisdiction statute, cannot constitutionally apply to claims filed in federal court against nonconsenting States. In the course of that decision, this Court indicated that there might be some "serious constitutional doubt" as to whether the tolling provision impermissibly abrogates state sovereignty "when a State consents to suit or when a defendant is not a State." *Id.*, 122 S.Ct. at 1006, 1008. This case raises that unanswered question.

Unlike the situation in *Raygor*, there is no Eleventh Amendment issue in this case. Petitioner sued a county defendant and one of its employees in federal court. The

federal district court granted summary judgment for the defendants on the federal claim. The statute of limitations issue arose only after the federal court dismissed the action in its entirety and the supplemental claims were refiled in state court. It is clear that federal district court could have entertained the state causes of action without raising any issue about state sovereignty or the statute of limitations. After the case moved from federal to state court, however, the South Carolina Supreme Court ruled that it was untimely and that section 1367(d) violated the Tenth Amendment and the Necessary and Proper Clause by unconstitutionally extending the state's statute of limitations.

STATEMENT OF THE CASE

Carl H. Jinks died of complications associated with alcohol withdrawal on October 18, 1994 at Respondent Richland County's Detention Center within four days of his arrest for failure to pay $1500 in child support. *Jinks v. Richland County*, 563 S.E.2d 104, 105 (S.C. 2002). At the time of his arrest, Respondent was put on notice that Jinks was suffering from alcohol withdrawal, a diagnosis confirmed by subsequent examination by Dr. Charles Eskridge, the detention center physician, who wrote a prescription for Jinks that was never administered. *See Jinks v. McCaulley*, 163 F.3d 598 (4th Cir. 1998)(table)(per curiam)(unpublished), App. C, *infra*, 13a [herinafter "*McCaulley*"]. In 1996, within the applicable state statute of limitations, Petitioner Susan Jinks brought an action against the county and its physician-employee in the United States District Court for the District of South Carolina, raising claims under 42 U.S.C. § 1983 and supplemental claims for wrongful death and survival under the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.* (Supp. 2001). *Jinks*, 563 S.E.2d at 105. On November 20, 1997, the district court granted defendants' motions for summary judgment on the Section 1983 claim. *Id.* On December 3, 1997, the court issued an order declining

to exercise jurisdiction over the remaining state claims and dismissed the state claims without prejudice pursuant to 28 U.S.C. § 1367(c)(3). *Id.* The Fourth Circuit subsequently affirmed the district court's rulings. *McCaulley*, 163 F.3d 598 (4th Cir. 1998)(table).

On December 18, 1997, fifteen days after the district court dismissed her action and while the federal appeal was pending, Petitioner filed a wrongful death and survival action in the Court of Common Pleas for Richland County. *Jinks*, 563 S.E.2d at 105. Her filing was well within the 30-day tolling period provided by 28 U.S.C. § 1367(d). After trial, a jury returned a verdict of $80,000 in actual damages in favor of Petitioner and against Richland County in the wrongful death action. It returned defense verdicts on the wrongful death action for Dr. Eskridge and on the survival action for both defendants. *Id.* After denial of its post-trial motions, Richland County appealed to the South Carolina Supreme Court. *Id.*

That court held 28 U.S.C. § 1367(d) unconstitutional, reasoning that it interferes "with the State's sovereignty in violation of the Tenth Amendment and the Necessary and Proper Clause." *Id.* at 108. In reaching that conclusion, the state Supreme Court held that, while "necessary" as a useful aid to federal jurisdiction, the tolling provision was not "'proper' within the meaning of the Necessary and Proper Clause. . . . [because it] interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit." *Id.* at 107. Further, citing this Court's decision in *Alden v. Maine*, 527 U.S. 706, 749 (1999), the State Supreme Court declared that "the State has the authority to determine *whether* it consents to suit within its own court system." 563 S.E.2d at 107 (emphasis in original). It then found that such consent exists only to the extent permitted by the state Tort Claims Act. *Id.* at 108. The court further held that, by extending the time period for waiver of sovereign immunity of the state's political

subdivisions, section 1367(d) exercised an attribute of state sovereignty, in violation of the Tenth Amendment. *Id.*

REASONS FOR GRANTING THE PETITION

The decision below of the South Carolina Supreme Court invalidates an important and frequently utilized federal law, in conflict with decisions of other state courts of last resort, United States courts of appeal, and a venerable holding of this Court. It represents the first court to find that section 1367(d), the tolling provision in the federal supplemental jurisdiction statute, is unconstitutional and thus void. It creates confusion on an important and frequently recurring issue of law and raises profound questions about the practical viability of the supplemental jurisdiction statute enacted by Congress in 1990. By virtue of the decision, federal courts may feel compelled to retain jurisdiction over supplemental claims better heard in state courts to avoid limitations problems. Alternatively, plaintiffs may be forced to forego their right to go to federal court when the cause of action includes a supplemental claim. Both results would frustrate the design and purpose of the supplemental jurisdiction statute.

In addition, the reasoning of the South Carolina Supreme Court, if upheld, would invalidate a wide variety of federal statutes and other exercises of federal judicial authority that stay state court proceedings.

Only this Court can resolve the problems created by the South Carolina decision and bring clarity to this important area of federal law.

I. THIS CASE SATISFIES SEVERAL KEY CONSIDERATIONS THAT GUIDE THIS COURT'S DISCRETION TO GRANT CERTIORARI

A. A State Supreme Court Has Invalidated a Federal Statute on Federal Constitutional Grounds

Certiorari is necessary because the decision of South Carolina's court of last resort invalidated a federal statute on federal constitutional grounds. One of the principal considerations governing the exercise of this Court's discretion to grant certiorari is whether a state court "has decided an important question of federal law that has not been, but should be settled by this Court." S. Ct. Rule 10(c). The rule assures that "'important federal issues . . . will reach this Court for adjudication [and] that state courts will not be the final arbiters of important issues under the federal constitution.'" *Arizona v. Evans*, 514 U.S. 1, 9 (1995)(quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)). The rule further assures uniform application in the federal and state courts of an important congressional enactment.

In this instance, the South Carolina Supreme Court has invalidated a twelve-year-old federal law that has significant implications for litigants' access to justice. This law is frequently utilized, especially by litigants like Petitioner, who assert a violation of her constitutional and civil rights under 42 U.S.C. § 1983 and who has a state cause of action emanating from the same set of facts. Because section 1367(d) is a critical component of an important federal law that is frequently utilized and whose validity is now in doubt, the South Carolina decision poses an important question of federal law that should be settled by this Court.

B. The Decision below Conflicts with Decisions of Other Courts

This case also involves a decision of a state court of last resort on "an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." S. Ct. Rule 10(b).

Several state courts of last resort have considered the application of section 1367(d). None have found it infirm or even found reason to doubt its constitutionality.[1] *See, e.g., Stevens v. ARCO Management of Washington D.C., Inc.*, 751 A.2d 995 (D.C. Ct. App. 2000)(applying tolling provision). *See also Estate of Fennell ex rel. Fennell v. Stephenson*, 137 N.C. App. 430, 528 S.E.2d 911 (N.C. App. 2000), *rev'd in part*, 354 N.C. 327, 554 S.E.2d 629 (N.C. 2001)(reversing application of § 1367(d) on non-constitutional grounds); *Pointer v. Western Heights Independent School Dist.*, 919 P.2d 5, 7 (Okla. 1996)(suggesting that § 1367(d) would apply in appropriate case).[2]

Similarly, United States courts of appeals have regularly applied section 1367(d), when appropriate, without finding any constitutional dilemma. In fact, the very existence of section 1367(d) has encouraged federal appellate courts to mandate modification of district court orders so as "to dismiss the pendent state claim without prejudice and to toll the period of limitations." *Franklin v. Zain*, 152 F.3d 783, 786 (8th Cir. 1998). In other instances, circuit courts have found no abuse of discretion when the district court has dismissed the action without prejudice *because* section 1367(d)'s tolling provision saved the right to

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[1] Only one other state supreme court has found that § 1367(d) cannot apply to cases where governmental immunity was waived for a limited period of time. In that instance, it did so without engaging in any federal constitutional analysis. *Lynn v. City of Jackson*, 63 S.W.3d 332 (Tenn. 2001)(holding, in accord with longstanding state precedent, that general savings statutes do not apply to extend the time for filing actions under the state Government Tort Liability Act, Tenn. Code Ann. §§ 29-20-201 *et seq.*).

[2] At least one lower state court addressed the constitutional issue. In that instance, it found section 1367(d) a valid exercise of congressional authority. *See Blinn Florida Dep't of Transp.*, 781 So. 2d 1103, 1108-10 (Fla. 1st DCA 2000).

go to state court despite the expiration of the limitations period. *See Hedges v. Musco*, 204 F.3d 109, 123-24 (3d Cir. 2000); *Seabrook v. Jacobson*, 153 F.3d 70, 72 (2d Cir. 1998); *Beck v. Prupis*, 162 F.3d 1090, 1099 (11th Cir. 1998); *Neal v. District of Columbia*, 131 F.3d 172, 175 n.5 (D.C. Cir. 1997); *Brown v. City of Boston*, 98 F.3d 1333, 1996 WL 590553, *1 (1st Cir. 1996)(unpublished)(App. E, 23a).

Equally important, the South Carolina Supreme Court's decision conflicts with the holding of this Court in *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348 (1944), wherein this Court declared that an otherwise applicable state statute of limitations "can hardly destroy a claim because the period of actual contest over it in a federal tribunal extends beyond the limitation period." That decision found that the purposes of notice and the avoidance of stale claims undergirding the state limitations period had been served by timely adjudication in a federal forum. Section 1367(d) operates on the same principle examined in *Railroad Telegraphers*. It provides a small and finite window in which a plaintiff may refile in state court if the limitations period expired during the pendency of the federal district court action.

C. The Issue Presented is Recurring and of Great Practical Significance

With both the constitutional validity and the state courts' acceptance of section 1367(d) in doubt, the resulting confusion on an important and recurring question of federal law provides an independently sufficient and compelling reason to grant certiorari in this case. The decision below, if allowed to stand unexamined, may well create a train wreck in the courts from inconsistent treatment of cases involving supplemental jurisdiction. Federal courts may unnecessarily retain jurisdiction and hear cases more suitable to state court adjudication, with adverse consequences for the federal docket and for the concept of comity. In some circuits, this

was the state of affairs before the 1990 enactment of the supplemental jurisdiction statute. *See, e.g., Edwards v. Okaloosa County*, 5 F.3d 1431, 1435 (11th Cir. 1993)(pre-1990 claim); *Henson v. Columbus Bank & Trust Co.*, 651 F.2d 320, 325 (5th Cir. 1981)(per curiam); *O'Brien v. Continental Ill. Nat'l Bank & Trust Co.*, 593 F.2d 54, 65 (7th Cir. 1979).

This Court has held that the decision to retain jurisdiction to hear the state claim is a matter "of discretion, not of plaintiff's right." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). If, however, the limitations period elapses while the federal case is pending, considerations of due process and decisions like those cited *infra* from the Fifth and Eleventh Circuits will transform that matter of discretion into one of plaintiff's right. *See Beck*, 162 F.3d at 1100 (collecting cases). In fact, several cases held, pre-section 1367(d), that district courts must grant a motion to reconsider if a state court found that the statute of limitations precluded it from hearing the supplemental claim. For example, the Fifth Circuit instructed that "if the district court determines that the pendant claim should be dismissed by the federal court and [the plaintiff] later discovers that his case is time barred in the state court, *the federal district court should grant a motion for reconsideration* of whether or not the federal court will exercise its pendent jurisdiction to hear the state law claim." *Rheaume v. Texas Dep't of Public Safety*, 666 F.2d 925, 932 (5th Cir. 1982)(emphasis added). *See also U.S. Industries, Inc. v. Blake Construction Co.*, 671 F.2d 539, 551 (D.C. Cir. 1981); *Henson, supra*; *McLaughlin v. Campbell*, 410 F. Supp. 1321, 1326 (D. Mass. 1976).

The continuing doubt about section 1367(d)'s validity will also chill litigants' pursuit of federal causes of action in federal court for fear that those causes could be dismissed some time after the state causes become time-barred. Section 1367(d)'s tolling provision limits the need for federal courts to adjudicate matters more properly heard in state

court. As such section 1367(d) addresses a concern expressed by this Court that a statute of limitations not operate to "foreclose some plaintiffs from litigating their state-law claims, [or] . . . chill other plaintiffs from bringing their federal-law claims." *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 352 n.9 (1988).

The District of Columbia Circuit has recognized that section 1367(d) "reduces one concern expressed in Carnegie-Mellon – that plaintiffs would lose their claims if their case were dismissed rather than remanded." *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1267 (D.C. Cir. 1995). Professor John Oakley, reporter for the American Law Institute's Federal Judicial Code Revision Project, confirms this understanding: "Congress clearly intended subsection 1367(d) to facilitate discretionary dismissal under subsection 1367(c) by relieving courts of concerns about the inequitable consequences of state limitations law barring the dismissed claim from refiling." John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 945 (1998).

Elimination or invalidation of section 1367(d) will either remove the discretion that district courts enjoy, add to the docket of an already overtaxed federal court system, and downgrade considerations of comity that might otherwise hold that these cases are more appropriately heard in state court – or, it will force plaintiffs' to forego their right, confirmed by Congress, to bring their actions initially in federal court, for fear of losing their state claim altogether.

D. South Carolina's Reasoning Would Override All Federal Authority to Stay State Court Proceedings

The South Carolina Supreme Court's decision rests on a determination that statutes of limitation are an attribute of state sovereignty that brook no federal interference,

regardless of the purpose or constitutional basis of the authority. *Jinks*, 563 S.E.2d at 108. The court conceded that section 1367(d) is an "'aid to the exercise of federal jurisdiction,' and, therefore, is 'necessary' within the meaning of the Necessary and Proper Clause [, U.S. Const. Art. I, Sec. 8, cl. 18], but asserted it cannot be "proper" within the meaning of that Clause. *Id.* at 107.

That reasoning casts doubt on the constitutionality of a variety of federal statutes that impose stays upon state courts and state court procedures. For example, federal bankruptcy law imposes an automatic stay on all judicial proceedings against the debtor. 11 U.S.C. § 362(a). The stay serves a two-fold purpose: (1) providing the debtor with a breathing spell from its creditors and saving the debtor from expending resources in other litigation; and, (2) creating order among potential creditors by preventing them from pursuing their own remedies separate from the bankruptcy proceedings. *See Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 966 F.2d 457, 459 (9th Cir. 1992). Because a statute of limitations might expire during the course of the automatic stay, the Bankruptcy Code provides a 30-day savings period that operates identically to section 1367(d). 11 U.S.C. § 108(c). Numerous courts have recognized that "[t]his section extends the statute of limitations for creditors in actions against the debtor, where the creditor is hampered from proceeding outside the bankruptcy court due to the provisions of 11 U.S.C. § 362 [the automatic stay provision]." *In re DiCamillo*, 186 B.R. 59, 61 (E.D. Pa. 1995)(quoting *Brickley v. United States (In re Brickley)*, 70 B.R. 113 (9th Cir. BAP 1986)). *See also Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1073 (2d Cir. 1993)(Section 108(c) "extended [the limitations period] for 30 days after notice of the termination of a bankruptcy stay, if any such deadline would have fallen on an earlier date.").

Because the bankruptcy stay operates as an "aid to the exercise of federal jurisdiction" in the same manner as

section 1367(d), South Carolina's reasoning would mandate that it be found unconstitutional.

The rationale behind the *Jinks* ruling would also adversely affect the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 525 (1994 ed.), which tolls legal actions involving those in the armed services during their military service. The Act has not been challenged on Tenth Amendment grounds, even though its application to military personnel who are not experiencing exigent circumstances would seem to have a lesser justification for congressional intrusion on state court matters. *See Conroy v. Aniskoff*, 507 U.S. 511 (1993).

The *Jinks* ruling also calls into question the validity of the federal Y2K Act, 15 U.S.C. § 6606(e)(4)(tolling during notice and remediation period for Year 2000-related claims) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9658 (setting uniform limitations-period commencement date in suits under state law for damages due to hazardous release exposure).

In sum, this Petition presents an issue of great federal importance with ramifications for a wide variety of statutes.

The South Carolina ruling also raises serious questions about a federal court's authority to stay state proceedings as a matter of inherent judicial power. Section 1367(d) tolling works in a fashion that is similar to a federal court's authority to stay pending state proceedings during removal as a "protective device which keeps separate tribunals from adjudicating the merits of the same controversy." *Wood v. DeWeese*, 305 F. Supp. 939, 941 (W.D. Ky. 1969).

The decision below even casts doubt on the authority this Court may exercise during the pendency of a petition

for certiorari, wherein a single justice of this Court may stay a state court of last resort's final judgment. *See, e.g., Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975)(Blackmun, J.)("As a single Justice, I clearly have the authority to grant a stay of a state court's 'final judgment or decree' that is subject to review by this Court on writ of certiorari."). Obviously, the exercise of such authority is an "aid to jurisdiction" in the same sense as section 1367(d).

Moreover, this Court has recognized that equitable tolling is permissible when consistent with congressional intent in enacting a particular statutory scheme. *See Bowen v. City of New York*, 476 U.S. 467, 479 (1986); *Honda v. Clark*, 386 U.S. 484 (1967). The equitable tolling doctrine generally permits a statute of limitations to be tolled provided that there is timely notice, lack of prejudice to the defendant, reasonable and good faith conduct on the part of the plaintiff, and a prayer for the same remedies in each forum. *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1133 (9th Cir. 2001).

Section 1367(d) operates in similar fashion to the equitable tolling doctrine. It is difficult to imagine how it, supported by statutory authority, can be unconstitutional when equitable tolling is not.

II. THE DECISION BELOW IS INCORRECT

A. Enactment of the Tolling Provision Is Within Congress's Constitutional Authority

Congress enacted section 1367(d), of the supplemental jurisdiction statute as part of a larger response to a set of problems identified by this Court, other courts, the Federal Courts Study Commission, the American Law Institute, and legal scholars.

Federal courts had long exercised the authority now known as supplemental jurisdiction as a matter of inherent judicial authority. Chief Justice John Marshall wrote as far back as 1824 that once a federal court found a "sufficient foundation for jurisdiction, . . . then all the other questions must be decided as incidental to this, which gives that jurisdiction." *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822 (1824). *Osborn* further recognized that "when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the [federal c]ourts jurisdiction of that cause, although other questions of fact or of law may be involved in it." *Id.* at 823. By 1966, it was firmly established that when federal and state claims "derive from a common nucleus of operative fact," Article III of the Constitution "permits the conclusion that the entire action before the court comprises but one constitutional case." *Gibbs*, 383 U.S. at 725.

The judicial authority to exercise such supplemental jurisdiction was recognized repeatedly by this Court,[3] until *Finley v. United States*, 490 U.S. 545, 549, 556 (1989), raised serious questions about whether congressional authorization was a necessary prerequisite to the exercise of that authority.[4] This Court strongly suggested that Congress

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[3] *See, e.g., Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 117, 120 (1984); *Murphy v. John Hofman Co.*, 211 U.S. 562, 569 (1909).

[4] As the Second Circuit observed, after *Finley*, "the continued viability of the doctrine of pendent party jurisdiction in any context is seriously in question." *Roco Carriers, Ltd. v. M/V Nurnberg Express*, 899 F.2d 1292, 1295 (2d Cir. 1990). *See also* 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3523.1, at 154 (Supp. 2002)(citation omitted)(indicating that purpose of supplemental jurisdiction law was to overrule the restrictions emanating from *Finley*).

resolve the uncertainty. *Id.* at 556. In light of *Finley* and similar decisions, the Federal Courts Study Committee recommended that Congress enact authorizing legislation. Federal Study Committee, Report of the Federal Courts Study Committee, pt. II, at 47 (Apr. & Jul. 1990). The Federal Courts Study Committee Implementation Act of 1990, 104 Stat. 5104 (1990), which addressed supplemental jurisdiction, was incorporated, as Title III, into the Judicial Improvements Act. Pub. L. No. 101-650, 104 Stat. 5089 (1990).

The tolling provision at issue here was a part of that enactment and was derived from a study of the American Law Institute. That study came about at the request of Chief Justice Earl Warren. ALI, Study of the Division of Jurisdiction Between State and Federal Courts ix (1969)(quoting Chief Justice Earl Warren, Opening Address to the 36th Annual Meeting of the American Law Institute (May 1959)). Even earlier, Professor Herbert Wechsler suggested that a tolling provision was a necessary ingredient in any statutory resolution of the issues surrounding supplemental jurisdiction. Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Probs. 216, 233 (1948). The ALI study suggested that a tolling provision be adopted for all claims initially filed in federal court which that court later determines should be tried in state court. *See* ALI Study, at 65. It argued that such a provision was necessary "as an aid to the exercise of federal jurisdiction, to see to it that a plaintiff is not discouraged from seeking a federal forum if he believes that such a forum is available." *Id.* at 453.

Tolling addressed a palpable dilemma faced by plaintiffs with both federal and state claims. Claim preclusion forced plaintiffs seeking vindication of their rights in federal court to include the state claims that arise from the same nucleus of facts in their lawsuit. *See* 18 Wright, Miller & Cooper, Federal Practice and Procedure, § 4412, p. 287. South Carolina, as most states, holds that a

"litigant is barred from raising any issues which were adjudicated in the former suit and *any issues which might have been raised in the former suit.*" *Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n*, 362 S.E.2d 176, 177 (S.C. 1987)(emphasis added).[5] A plaintiff, choosing to adjudicate in the federal forum, as is his or her right, must raise and cannot separately litigate the state-based causes of action.

At the same time, notions of comity, judicial economy, convenience, and fairness to litigants have compelled the federal courts to adopt a powerful preference for referring any remaining state claims to the state courts for adjudication, if the federal causes of action are dismissed. *See, e.g., Gibbs*, 383 U.S. at 726-27; *see also id.* at 726 n.15 (quoting *Strachman v. Palmer*, 177 F.2d 427, 431 (1st Cir. 1949))("Federal courts should not be over-eager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation."). *See also Brandenburg v. Housing Auth. of Irvine*, 253 F.3d 891, 900 (6th Cir. 2001) ("In fact, the usual course is for the district court to dismiss the state-law claims without prejudice if all federal claims are disposed of on summary judgment."); *Carr v. CIGNA Sec., Inc.*, 95 F.3d 544, 546 (7th Cir. 1996)(calling it the "general rule").

The doctrine of pendent jurisdiction, now called supplemental jurisdiction, did not, however, toll the statute of limitations for the pendent state-law claims. The federal courts used a number of creative solutions to address the plaintiffs' predicaments. Some courts required the defendant to waive the state statute of limitations. For

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[5] *Compare L.A. Draper & Son, Inc., v. Wheelabrator-Frye, Inc.*, 454 So. 2d 506 (Ala. 1984); *Hauser v. Mealey*, 263 N.W.2d 803 (Minn. 1978); *International Games, Inc. v. Sims*, 444 N.E.2d 736 (1982); *City of Los Angeles v. Superior Court*, 149 Cal. Rptr. 320, 85 Cal. App. 3d 143 (Ct. App. 2d Dist. 1978).

example, in *Financial General Bankshares, Inc. v. Metzger*, 680 F.2d 768, 778 (D.C. Cir. 1982), the District of Columbia Circuit found that the locally based claim should be dismissed for adjudication in the local courts but not "until the plaintiff has filed an action in the Superior Court of the District of Columbia and the defendant has filed in that court a record of waiver of any applicable statute of limitations." Similar waivers were required in other courts. *See Duckworth v. Franzen*, 780 F.2d 645, 657 (7th Cir. 1985)(opinion by Posner, J.), *cert. denied*, 479 U.S. 816 (1986); *Brewer v. City of El Cerrito*, 666 F. Supp. 1346, 1351 (N.D. Cal. 1987); and *Harkins Amusement Enterprises, Inc. v. Harry Nace Co.*, 657 F. Supp. 1037, 1040 (D. Ariz. 1987).

Other courts found the existence of a statute of limitations issue a sufficient reason to retain jurisdiction over a supplemental claim that would otherwise be heard in state court. Then-Judge Breyer, speaking for a panel of the First Circuit, held "that expiration of a state limitations period is an important factor for a district court to consider when deciding whether or not to dismiss a pendent claim." *Newman v. Burgin*, 930 F. 2d 955, 963 (1st Cir. 1991). Although not adopting a hard and fast rule, *Newman* recognized that a number of courts had held that the failure of a district court to exercise jurisdiction over the state law claim was an abuse of discretion when the case faced a state statute-of-limitations problem. *Id.* at 963-64 (citing *L.A. Draper & Son,*, 735 F.2d at 427-30; *Henson*, 651 F.2d at 325; *O'Brien*, 593 F.2d at 65. *See also Beck supra; Edwards, supra.*

Similarly, in a case that had originally been removed to federal court and then was appropriately sent back to state court after the plaintiffs dismissed their federal claim, this Court held that the elapse of the relevant limitations period was "a potent reason for giving federal courts discretion to remand" such claims to keep them alive. *Carnegie-Mellon University*, 484 U.S. at 352. Remand,

however, is not an available option when the case is originally filed in federal court.

A third approach held that federal court reconsideration was mandatory if a state court found the statute of limitations precluded hearing the case. *See Rheaume*, 666 F.2d at 932; *U.S. Industries*, 671 F.2d at 551; *Henson*, 651 F.2d at 325; *McLaughlin*, 410 F. Supp. at 1326.

These solutions were unsatisfactory for a number of reasons. First, the solutions were uncertain, ad hoc and often discretionary, leaving the plaintiff to guess whether a state court would entertain the supplemental claims if his or her federal cause was dismissed or that the federal court would protect the claim. Under these circumstances, counsel would be ill-advised to chance dismissal of all claims in the federal forum, even though his or her client had a right to pursue the case in that forum.

Second, the solutions were unduly complex and eschewed the principle of judicial economy, adding significant additional litigation time and effort to a case while undesirably overtaxing both the parties and the courts. Third, all the solutions entailed a significant invasion of state sovereignty. Required waiver of the limitations period on a case-by-case basis, without congressional authorization, was especially problematic when the defendant, as here, was a political subdivision of the state. Deciding to keep or reconsider dismissal of a case more appropriate to adjudication in state court solely to avoid the limitations problem created serious problems under the doctrine of comity, which this Court has repeatedly described as a "vital consideration." *See, e.g., Younger v. Harris*, 401 U.S. 37, 44 (1971).

Stepping into this breach, Congress enacted section 1367(d) to enable a plaintiff to litigate in federal court without risking that his or her state law claims could be lost

because of a state statute of limitations. The federal interest in resolving this issue is both fundamental and legitimate. This Court has long held that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). This Court has also found that due process assures that a litigant can make his case "'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)(quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Earlier this year, this Court recognized that a constitutionally based access to court claim exists "to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury*, 122 S.Ct. 2179, 2186 (2002). Read together, these cases establish that a timely lawsuit, properly invoking the jurisdiction of the federal courts, cannot lose its legitimacy and constitutional protection when it is subsequently determined that the case should more properly be tried in state court. Refiling in state court cannot deprive that plaintiff of any ability to seek judicial vindication. Yet, that, unfortunately, is what the South Carolina Supreme Court's decision would do.

In furtherance of considerations of comity and *Marbury's* first duty of government, Congress enacted section 1367(d) so litigants do not have to relinquish their rights of access to the courts because it has made available a federal forum that might later decline to entertain the lawsuit. South Carolina's rejection of Section 1367(d) discriminates against this federal right. *See* discussion pp. 26-27 *infra*.

B. Section 1367(d) Violates Neither the Necessary and Proper Clause nor the Tenth Amendment

The South Carolina Supreme Court misconceived the Necessary and Proper Clause when it declared section 1367(d) violative of it. *Jinks*, 563 S.E.2d 108. The Clause states that "The Congress shall have Power . . .":

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. Art. I, Sec. 8, cl. 18. The South Carolina Supreme Court conceded that section 1367(d) "is a useful 'aid to the exercise of federal jurisdiction,' and, therefore, is 'necessary.'" *Jinks*, 563 S.E.2d at 107 (citation omitted). However, it found that the tolling provision was not "proper" because it "interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit." *Id.*

This reading misapprehends the import of the word "proper" and reaches too far. The requirement that a law be "proper" requires that Congress only exercise powers reasonably ancillary to express constitutional authority and not those otherwise prohibited. As a general proposition, "Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim. This is but a corollary to the grant to Congress of any Article I power." *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966)(citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)). Moreover, this Court has recognized that the Constitution gives Congress "'the necessary resources of flexibility and practicality . . . to perform its function.'" *Yakus v. United States*, 321 U.S. 414, 425 (1944)(citation omitted). These teachings are in accord with Justice Story's Commentaries, which described the Necessary and Proper Clause as removing all uncertainty

about congressional authority to carry out its obligations. 3 Joseph Story, Commentaries on the Constitution § 1238 (1833). The test, Story wrote, is "whether it is properly an incident to an express power, and necessary to its execution. If it be, then it may be exercised by congress." *Id.*

The grant of supplemental jurisdiction to the federal courts occasioned by section 1367 was unquestionably within congressional authority to enact. The Necessary and Proper Clause has long been regarded as authorizing Congress to enact appropriate laws that assist the federal courts in executing their Article III duties. Section 1367(d)'s tolling provision does precisely that by limiting the need for federal courts to adjudicate matters more properly heard in state court and by assuring that the possibility of dismissal of the federal cause does not improperly "foreclose some plaintiffs from litigating their state-law claims, [or] . . . chill other plaintiffs from bringing their federal-law claims." *Carnegie-Mellon*, 484 U.S. at 352 n.9.

Nor is this authority otherwise prohibited to Congress. This Court's cases teach that the concerns that animate Tenth Amendment considerations are not rigidly pro-federal nor blindly deferential to "State's Rights." An examination of history reveals

> [t]he Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger, 401 U.S. at 44.

In enacting section 1367(d), Congress was sensitive to State interests and did not "unduly interfere with the legitimate activities of the States." Rather than inappropriately invade state sovereignty, as characterized by the South Carolina Supreme Court, section 1367(d) enhances federal judicial recognition of state sovereignty by preventing far more intrusive invasions of that sovereignty through a narrowly tailored and extremely limited solution that accommodates the States' interest in litigating these matters in state courts.

Section 1367(d) merely saves – for a maximum excess period of 30 days – a preexisting lawsuit that must be refiled to allow the matter to be heard in a forum preferable to the State, namely, in its own courts. That constitutionally cognizable preference was expressed by the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.*, which authorizes certain lawsuits against the State or its political subdivisions.[6]

Congress's accommodation of this most basic State interest works no prejudice to other State interests. The function of a statute of limitations, as in this case, is satisfied by the timely filing and prosecution of the action in federal court. It is patently appropriate for the federal courts to entertain such a lawsuit under its supplemental jurisdiction. Thus, an action like that of Petitioner was timely filed and properly raised all the issues that Respondent was obligated to defend under the Tort Claims Act. It cannot now logically

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[6] Governmental immunity was judicially abolished in South Carolina in 1985. *McCall v. Batson*, 329 S.E.2d 741 (S.C. 1985). The Tort Claims Act was passed by the General Assembly to reestablish some of that immunity. *Jinks*, 563 S.E.2d at 108. The Act makes the State, its agencies, political subdivisions, and other governmental entities "liable for their torts in the same manner and to the same extent as a private individual under like circumstances" with certain limited exceptions. S.C. Code Ann. § 15-78-40.

complain that the movement of that case from federal to state court abrogated their responsibility to respond to the lawsuit.

This Court has noted that statutes of limitations serve a legitimate, but limited purpose. Such statutes

> are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Railroad Telegraphers, 321 U.S. at 348-49. In that decision, this Court rejected an argument that a state statute of limitations barred a collective bargaining enforcement action brought in federal court after an administrative board had adjudicated the issue. The employer had argued that the state statute of limitations had expired during the pendency of the administrative board hearing. Writing for the Court, Justice Jackson rejected the argument, flatly stating that a "state statute of limitations can hardly destroy a claim because the period of actual contest over it in a federal tribunal extends beyond the limitation period." *Id.* at 348.

In reaching that conclusion, this Court noted that the legitimate purposes of the limitations period had been served. Commencement of the administrative action had put the defendant on notice and the continuing nature of the dispute before adjudicatory bodies assured that the claim was not stale and that the evidence remained available. As a practical matter, this Court found "it cannot be said that the claims were not timely pursued. Regrettable as the long

delay has been it has been caused by the exigencies of the contest, not by the neglect to proceed." *Id.* at 349. The logic of the decision has considerable force in Petitioner's case. Her original federal court action, including the supplemental claim, and the refiled action in state court evidences no neglect and still comprises but a single "constitutional case." *Gibbs*, 383 U.S. at 725.

South Carolina law takes a similar view about the purposes and limits of statutes of limitations. Its Supreme Court recently held: "The limitations period is intended to run against those who are neglectful of their rights and who fail to exercise reasonable diligence in enforcing their rights. However, it is not the policy of the law to unjustly deprive an injured person of a remedy." *Moriarty v. Garden Sanctuary Church of God*, 534 S.E.2d 672, 679 (S.C. 2000). The state's caselaw regards the limitations period as serving two fundamental purposes, consistent with teachings of this Court: one purpose "is to relieve the courts 'of the burden of trying claims when a plaintiff has slept on his rights'" and another "is to protect potential defendants from protracted fear of litigation." *Moates v. Bobb*, 470 S.E.2d 402, 404 (S.C. Ct. App. 1996)(quoting *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965))(other citations omitted).

None of those underlying purposes are abridged when, as here, the claim was timely pursued in a federal court, only to be refiled in state court when the federal court determined the case was best tried there. The factors that sometimes outweigh the interest in vindication dissolve entirely in such circumstances. There has been no untimely period of repose and the claims are not stale because the matter has been in litigation for some period of time and was brought within the requisite state-imposed time period.

On that basis, section 1367(d) is a reasonable and rational solution to a real and legitimate problem. It is also clear that Congress conditioned the return of cases to state

courts on the fact that there would be a small 30-day window in which those cases may be reasserted in that forum. *See Hedges*, 204 F.3d at 123. In doing so, Congress was acting on authority derived from Article III to allocate judicial authority to courts inferior to this Court. This Court has found that it is the *"duty* of Congress to pass such laws as [are] necessary and proper to carry into execution the powers vested in the judicial department." *Ableman v. Booth*, 62 U.S. 506, 521-22 (1858)(emphasis added). The congressional enactments are made applicable to the states through the Supremacy Clause, which provides:

> Laws . . . which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the *Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2 (emphasis added).

In considering the conjunction between this constitutional command and the Tenth Amendment, this Court recently said:

> Although Congress may not require the legislative or executive branches of the States to enact or administer federal regulatory programs, see *Printz [v. United States*, 521 U.S. 898,] 935 [(1997)]; *New York [v. United States]*, 505 U.S. [144,] 188 [(1992)], *it may require state courts . . . to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power," Printz, supra,* at 907[].

Alden v. Maine, 527 U.S at 752 (emphasis added).

As an aid to jurisdiction, the tolling provision is "appropriate for the judicial power." The exercise of that power is not a matter in which a State, a political subdivision, or even a private party is "be[ing] forced to entertain in [state] courts suits from which it was immune in federal court." *Howlett v. Rose*, 496 U.S. 356, 365 (1990). It is instead a matter in which the federal court had full authority to hear the case, but has deferred its right to hear the case to the state court in recognition of the State's predominant interest.

C. The Tolling Provision Prevents Discrimination Against a Federal Right

Tenth Amendment concerns surely evaporate when state law discriminates against litigants asserting federal constitutional rights. In *James v. Kentucky*, 466 U.S. 341 (1984), this Court held that a litigant cannot be compelled to comply with state procedural rules so onerous that they unreasonably burden the exercise of those rights. In *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967), a state law that penalized an individual for seeking federal judicial redress, with one penalty being forfeiture of any related state law claim against the same defendant, was found unconstitutional.

Last term, this Court noted that

> Most state procedures are supported by various legitimate interests, so established rules have been set aside only when they appeared to be calculated to discriminate against federal law, or, as one treatise puts it, they *did not afford* the defendant *"a reasonable opportunity to assert federal rights."* 16B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure, § 4027, p. 392 (2d ed. 1996)(hereinafter Wright & Miller).

Lee v. Kemna, 534 U.S. 362, 122 S.Ct. 877, 894 (2002). *See also Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361 (1952)("State laws are not controlling in determining what the incidents of this federal right shall be."); *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923) (Holmes, J.)("the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . local practice shall not be allowed to put unreasonable obstacles in the way.").

Here, Congress established a right to take a federal cause of action and a state claim ancillary to it to federal court. It created as well a means by which the federal court could cede responsibility to hear the state matter to state court by tolling the applicable statute of limitations. Congress had such authority and exercised it prudently to recognize both plaintiffs' fundamental due process rights and the rights of the State. Application of a rule that allows defendants to reassert the statute of limitations after the legal contest was timely begun is a "harsh . . . rule" that "is wholly incongruous with the general policy of the Act." *Dice*, 342 U.S. at 362. Section 1362(d) is constitutional.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that certiorari be granted.

Respectfully submitted,

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July 18, 2002

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APPENDICES

Page

A. Opinion of the Supreme Court of South Carolina (April 22, 2002)..... 2a

B. Judgment of Court of Common Pleas, State of South Carolina, County of Richland (November 16, 1999)..... 11a

C. Opinion of the Fourth Circuit Court of Appeals (September 1, 1998)..... 13a

D. Order of the U.S. District Court for the District of South Carolina, Columbia Division (December 1997)..... 21a

E. Opinion of the First Circuit Court of Appeals in *Brown v. City of Boston*, 98 F.3d 1333 (1st. Cir 1996)(table)(per curiam)(unpublished)..... 23a

F. Constitutional and Statutory Provisions Involved..... 26a

A. Opinion of the Supreme Court of South Carolina (April 22, 2002), 563 S.E.2d 104

Supreme Court of South Carolina.

Susan JINKS as Personal Representative of the Estate of Carl H. Jinks,
Respondent,
v.
RICHLAND COUNTY and Dr. Charles Eskridge,
Defendants,
of whom Richland County is Appellant.

No. 25446.

Heard Feb. 20, 2002.
Decided April 22, 2002.

Andrew F. Lindemann, William H. Davidson, II, David L. Morrison, and Alice Price Adams, of Davidson, Morrison and Lindemann, P.A., of Columbia, for appellant.

Bradford P. Simpson, Theile Branham, and John D. Kassel, of Suggs & Kelly Lawyers, P.A.; and James M. Griffin, of Simmons & Griffin, L.L.C., all of Columbia, for respondent.

James E. Parham, Jr., of Irmo, for defendant Dr. Charles Eskridge.

Justice BURNETT:

Respondent Susan Jinks brought this wrongful death and survival action on behalf of her husband, Carl H. Jinks (Jinks and his wife are referred to collectively as "Jinks"), who died while incarcerated at Appellant Richland County's (County's) Detention Center. The jury returned an $80,000 verdict in Jinks' favor for wrongful death. County appeals.

FACTS

On October 14, 1994, Jinks was arrested for failure to pay child support, booked, and confined at County's Detention Center. He died at the Detention Center four days later.

In 1996, Jinks brought an action in the United States District Court against County, its detention center director, and the detention center physician alleging the defendants violated 42 U.S.C. § 1983 (1994). In addition, the complaint alleged supplemental state claims of outrage and negligence under the South Carolina Tort Claims Act (the Tort Claims Act). *See* S.C.Code Ann. §§ 15-78-10 to -200 (Supp.2001). The district court granted the defendants' motions for summary judgment on the Section 1983 claim, [FN1] issued an order declining to exercise jurisdiction over the remaining state claims, and dismissed the state claims without prejudice pursuant to 28 U.S.C.A. § 1367(C)(3) (1993).

FN1. The Court of Appeals affirmed the district court. *Jinks v. McCaulley*, 163 F.3d 598 (4th Cir.1998).

On December 18, 1997, sixteen days after the federal judge issued his order dismissing the state claims, Jinks filed the present wrongful death and survival action alleging various negligent acts by County and its detention center physician. County answered, claiming immunity from suit under the Tort Claims Act, violation of the statute of limitations, collateral estoppel, and other defenses.

ISSUE

Does 28 U.S.C.A. § 1367(d) violate the Tenth Amendment to the United States Constitution?

DISCUSSION

County contends Jinks failed to bring this state court action within the two year statute of limitations provided by the Tort Claims Act and, therefore, the claim is barred. *See* §

15-78-100(a). [FN2] Jinks maintains the statute of limitations was tolled pursuant to 28 U.S.C. § 1367(d) (hereafter referred to as " § 1367(d)") while the original lawsuit was pending in federal court. In response, County asserts in enacting § 1367(d), Congress exceeded its Article III and Necessary and Proper Clause [FN3] powers, thereby violating the Tenth Amendment to the United States Constitution. Specifically, County claims § 1367(d) infringes on South Carolina's sovereign immunity by extending the length of time in which a person may sue a political subdivision of the State on grounds of negligence. We agree with County.

FN2. Jinks filed the current action fourteen months after the statute of limitations expired.

FN3. U.S. Const. art. I, § 8, cl. 18.

In relevant part, 28 U.S.C.A. § 1367 provides:

(a) ... in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution....

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

...

(3) the district court has dismissed all claims over which it has original jurisdiction, ...

(d) The period of limitations for any claim asserted under subsection (a) ... shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

....

Section 1367 was adopted as part of the Judicial Improvements Act of 1990. Pub.L. 101-650, 104 Stat. 5089

(1990). "The statute ... gives federal courts supplemental jurisdiction to the limits the case-and-controversy clause of Article III of the [United States] Constitution permits." Charles A. Wright, Arthur R. Miller, Edward H. Cooper, 13 *Federal Practice and Procedure* § 3523.1 at 143 (2d ed. Supp.2001). [FN4]

FN4. Section § 1367 "codified the doctrines of pendent claim, pendent party, and ancillary jurisdiction under the more general label of 'supplemental jurisdiction'." Brian A. Beckcom, Note, *Pushing the Limits of the Judicial Power: Tolling Statutes of Limitations under 28 U.S.C. § 1367(D)*, 77 TEX. L.REV. 1049, 1051 (1999).

The Tenth Amendment provides "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. Const. amend X. "In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States*, 505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

> [W]e ask two questions to determine whether a statute violates [the Tenth Amendment]. First, whether the regulation it embodies is within Congress' power as being within those enumerated in the Constitution. Second, whether, even if so, the means of regulation employed yet impermissibly infringe upon state sovereignty.

United States v. Johnson, 114 F.3d 476, 480 (4th Cir.1997), *referring to New York v. United States, supra.*

Article III of the United States Constitution establishes the basis for the judicial power of federal courts. By virtue of

Article III and the Necessary and Proper Clause, Congress has power to enact laws that govern the practice and procedure in federal courts. *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

The Necessary and Proper Clause, referred to as the "Sweeping Clause," provides that Congress is empowered "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States." U.S. Const. art. I, § 8, cl. 18. "[T]he Sweeping Clause is not a self-contained grant of power. It authorizes Congress only to pass laws that 'carry[ ] into Execution' powers the Constitution elsewhere vests in one or more institutions of the federal government." Gary Lawson and Patricia B. Granger, *The "Proper" Scope of Federal Po... -- A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 274 (1993).

Within the Sweeping Clause, "necessary" does not mean absolutely required but "convenient, or useful, or essential to another." *McCulloch v. Maryland*, 4 Wheat. 316, 413, 17 U.S. 316, 4 L.Ed. 579 (1819). In order for a law to be "proper" within the meaning of the Clause, it must not violate the principles of state sovereignty. *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).

County maintains § 1367(d) is neither necessary nor proper. First, County asserts since the tolling provision does not apply until after the federal action is dismissed, the statute is not "necessary" to federal practice and procedure. Second, County argues § 1367(d) is not "proper" because it interferes with a state's sovereignty by abrogating the statute of limitations. More particularly, County claims Congress lacks the constitutional authority to extend the statute of limitations governing actions in which the State has waived its sovereign immunity.

County correctly asserts § 1367(d) regulates state court

practice and procedure as it tolls the statute of limitations for a state claim asserted in state court. However, the tolling provision also affects federal practice as it allows litigants to pursue actions in federal court without giving up access to state court in the event the federal jurisdictional basis is determined not to exist. It governs federal practice and procedure as it eliminates the need for federal judges to retain supplemental claims which would be dismissed as stale if pursued in state court. [FN5] Section 1367(d) is a useful "aid to the exercise of federal jurisdiction," and, therefore, is "necessary" within the meaning of the Necessary and Proper Clause. Brief for Petitioner at 27, *Raygor v. Regents of the Univ. of Minnesota*, 2001 WL 913842 (Case No. 00- 1514).

> FN5. *See* Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute--A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 983 (1992) (discussing pre- § 1367(d) approaches in determining propriety of discretionary dismissal of a supplemental claim).

We conclude, however, that, as applied to the States and their political subdivisions in tort actions, passage of § 1367(d) is not "proper" within the meaning of the Necessary and Proper Clause. In these circumstances, the tolling provision interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit.

> [T]he constitution of the United States, which recognizes and preserves the autonomy and independence of the states,--independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Erie R. Co. v. Tompkins, 304 U.S. 64, 78-79, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

As a matter of sovereignty, the State has the authority to determine *whether* it consents to suit within its own court system. *Alden v. Maine*, 527 U.S. 706, 749, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) ("... the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself."); *Nevada v. Hall*, 440 U.S. 410, 414, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979) ("[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of [its] immunity" from suit). In addition, the State has the authority to determine the *conditions* under which it consents to suit. *Alden v. Maine, supra* (suggesting state's waiver of immunity is limited to the parameters set forth by the state statute); *Beers v. Arkansas*, 20 How. 527, 529, 61 U.S. 527, 15 L.Ed. 991 (1857) (because waiver of sovereign immunity is "altogether voluntary," "it follows that [the State] may prescribe the terms and conditions on which [the State] consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires."). Most recently, the United States Supreme Court recognized that "although we have not addressed whether federal tolling of a state statute of limitations constitutes an abrogation of state sovereign immunity with respect to claims against state defendants, we can say that the notion at least raises serious constitutional doubt." *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, ----, 122 S.Ct. 999, 1006, 152 L.Ed.2d 27, 38 (2002); *see Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530, 533-34, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949) (federal court "cannot give [state claim] longer life in the federal court than it would have had in the state court without adding something to the cause of action.").

Under the doctrine of sovereign immunity, governmental entities in South Carolina were protected from suits alleging

tortious conduct by their employees until 1985. *Town of Duncan v. State Budget and Control Bd.*, 326 S.C. 6, 482 S.E.2d 768 (1997). In that year, the Court abolished the sovereign immunity of the State and all local governmental subdivisions. *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). In response, the General Assembly enacted the Tort Claims Act, reinstating sovereign immunity for the State and its political subdivisions with certain exceptions. § 15-78-20. The Tort Claims Act provides a limited waiver of governmental immunity and delineates the conditions upon which a claimant may pursue actions against the State and its political subdivisions. *Moore v. Florence School Dist. No. 1*, 314 S.C. 335, 444 S.E.2d 498 (1994); *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); *see* § 15-78-40 (the State, its agencies, political subdivisions, and other governmental entities are "liable for their torts in the same manner and to the same extent as a private individual under like circumstances" subject to certain limitations and exemptions in the Tort Claims Act). One of the conditions is that an action must be brought within two years of the date of loss. § 15-78-100(a).

Section 1367(d) potentially exposes political subdivisions to litigation and liability after the limitations period established by the State has expired. Accordingly, in tort actions against political subdivisions, § 1367(d) extends the waiver of the sovereign immunity of political subdivisions, thereby interfering with the State's sovereignty in violation of the Tenth Amendment and the Necessary and Proper Clause. *Lynn v. City of Jackson*, 63 S.W.3d 332 (Tenn.2001) (§ 1367(d) cannot extend statute of limitations in governmental tort claim actions in which State has consented to being sued without abrogating doctrine of sovereign immunity).

As a practical matter, we recognize our decision may affect a plaintiff's decision to pursue a tort action against a political subdivision in federal court. We conclude, however, that a party's ability to choose its forum should not prevail over the State's sovereign authority to establish the terms under

which its political subdivisions may be sued. Furthermore, our decision does not limit a plaintiff's ability to prosecute one action joining all federal and state law claims. Should a plaintiff fear the federal court system will be unable to determine her claims within the statute of limitations, she may bring the action in state court.

In summary, Congress exceeded its constitutional authority in enacting § 1367(d) to the extent it interferes with the States' sovereignty to establish the conditions upon which tort actions may be maintained against political subdivisions. Consequently, we conclude the tolling provision does not apply in these circumstances. *See Raygor v. Regents of Univ. of Minnesota, supra* (§ 1367(d) does not apply to dismissals of claims against nonconsenting States dismissed in federal court on Eleventh Amendment grounds). Accordingly, § 1367(d) did not toll Jinks' tort action against County. Since her complaint was not filed within the two year statute of limitations provided by the Tort Claims Act, her negligence claim against County is barred as untimely. The trial judge erred in holding otherwise. [FN6]

> FN6. In light of our disposition of this issue, it is unnecessary for us to address County's remaining arguments.

REVERSED.

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ., concur.

563 S.E.2d 104 (S.C. 2002).

B. Judgment of Court of Common Pleas, State of South Carolina, County of Richland (November 16, 1999)

State of South Carolina — Judgment in a Civil Case
County of Richland

In the Court of Common Pleas — Case No. 97-CP-40-4456

Susan Jinks	Richland County et al.
PLAINTIFF(S)	DEFENDANT(S)

CHECK ONE:

[x] **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

[ ] **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] **ACTION DISMISSED (*CHECK REASON*):** [ ]Rule 12(b), SCRCP; [ ]Rule 41(a), SCRCP (Vol. I Nonsuit); [ ] Rule 43(k), SCRCP (Settled); [ ]Other- _____

[ ] **ACTION STRICKEN (*CHECK REASON*):** [ ]Rule 40(j) SCRCP; [ ]Bankruptcy; [ ]Other-_____

IT IS ORDERED AND ADJUDGED: [ ]See attached order; [ ]Statement of Judgment by the Court;

> Verdict for Plaintiff in the amount of $80,000 against Richland County.

Dated at COLUMBIA, South Carolina, this 12th day of Nov 1999.

L. Henry McKellar /s/
PRESIDING JUDGE

This judgment was entered on the 16th day of November 1999 and a copy mailed first class this ____ day of _____, 19___ to attorneys of record or to parties (when appearing pro se) follows:

James M. Griffin	William H. Davidson
_____	Aiice Adams
_____	David Morrison
_____	_____
ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)

Barbara A. Scott
CLERK OF COURT

C. Opinion of the Fourth Circuit Court of Appeals (September 1, 1998)(unpublished), 163 F.3d 598

United States Court of Appeals, Fourth Circuit.

Susan JINKS, individually and as personal representative of the Estate of Carl H. Jinks, Plaintiff-Appellant,
v.
James McCAULEY; Richland County, South Carolina; Charles Eskridge, Doctor, Defendants-Appellees,
and
Richland County Detention Center; Gurney Bell; Jane Roe; John Doe, Defendants.

No. 98-1003.

Sept. 1, 1998.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Matthew J. Perry, Jr., Senior District Judge. (CA-96-1650-3)

James M. Griffin, SIMMONS, GRIFFIN & LYDON, L.L.P., Columbia, South Carolina; Bradford P. Simpson, SIMPSON, DONG & WINGATE, L.L.P., Columbia, South Carolina, for Appellant.

William H. Davidson, II, Andrew F. Lindemann, DAVIDSON, MORRISON & LINDEMANN, P.A., Columbia, South Carolina; James E. Parham, Jr., Columbia, South Carolina, for Appellees.

Before NIEMEYER, HAMILTON, and LUTTIG, Circuit Judges.

OPINION

PER CURIAM.

Appellant Susan Jinks ("Susan") appeals the district court's grant of summary judgment to Appellees in her 42 U.S.C. § 1983 (1994) action. Finding no error in the district court's decision to grant summary judgment to Appellees, we affirm.

Susan's suit against Appellees--Richland County, South Carolina ("Richland County"), James McCauley ("McCauley"), and Dr. Charles Eskridge ("Eskridge")-- arose out of the death of her husband Carl H. Jinks ("Carl"), which occurred while he was a prisoner in the Richland County Detention Center (the "jail"). Suing as personal representative of Carl's estate, Susan alleged that Appellees violated Carl's Eighth Amendment right to be free from cruel and unusual punishment and that those violations resulted in Carl's death. These allegations were based on the following facts.

On October 14, 1994, a South Carolina judge found Carl in contempt of court for nonpayment of $1500 in child support and sentenced Carl to confinement in jail pending payment. Carl, who had been "booked" into the jail that morning, informed the court that he was an alcoholic, that he was experiencing withdrawal from alcohol, and that he wished to be placed in a treatment center rather than jail. The court informed Carl that it could not order him to be confined to a treatment center and that he would have to ask to see a physician at the jail before anything could be done for him.

Nothing in the record indicates that Carl asked to see a physician once he returned to the jail. However, approximately three days later, on October 17, a guard at the jail observed Carl clutching the bars of his cell while shaking, sweating profusely, smiling, and laughing. Although Carl did not request medical care, the guard

reported the situation to his supervisor, who escorted Carl to Eskridge, a private physician under contract to provide medical services to the jail.

Eskridge examined Carl and determined that he was suffering from Stage II alcohol withdrawal. Eskridge prescribed the drug Librium, which is used to treat the symptoms of alcohol withdrawal, ordered Carl to be kept under observation, and scheduled a "follow-up" visit for the next day. According to his testimony in the district court, Eskridge did not feel that Carl's situation was urgent, [FN1] and therefore he did not direct jail officials to begin administering the drug to Carl immediately. Instead, Eskridge acted with the knowledge that the Librium would be ordered from a private pharmacy and delivered to the jail the next morning, at which time Carl could begin taking it. [FN2]

The record discloses that officials at the jail followed Eskridge's orders. Guards periodically checked on Carl, and at approximately 6:30 a.m. on October 18, they noticed that Carl had gotten down from his bunk and was sleeping on the floor. They continued to check on Carl, and at approximately 9:30 a.m., they observed Carl sitting upright in the cell. [FN3] According to one of the guards, Carl was no longer sweating, shaking, laughing, or smiling. [FN4] However, while guards were placing two other inmates in the cell with Carl at 10:30 a.m., the guards discovered that Carl was dead.

Susan commenced this action in June 1996. In her complaint, she asserted several different allegations regarding Appellees. First, she alleged that Richland County violated Carl's Eighth Amendment rights by maintaining a policy or custom of inadequate medical care for inmates in the jail. Second, she alleged that Richland County's policy or custom of ordering prescriptions for inmates to be delivered the next day violated Carl's Eighth Amendment rights. Third, she alleged that Richland County violated Carl's

Eighth Amendment rights by failing to implement a detoxification policy in the jail, by failing to require guards to document their carrying out of a physician's orders, and by allowing overcrowding at the jail. Fourth, Susan alleged that James McCauley, Director of the jail, violated Carl's Eighth Amendment rights by permitting these conditions to exist in the jail. Finally, Susan alleged that Eskridge violated Carl's Eighth Amendment rights by providing negligent care and treatment that resulted in Carl's death.

After discovery, Appellees moved for summary judgment. Finding that Susan presented no triable issues of fact on any of her claims, the district court granted that motion in November 1997. This appeal followed.

We review the district court's grant of summary judgment de novo [FN5] and affirm its decision in its entirety. First, the district court determined that Susan's claim that Richland County violated Carl's Eighth Amendment rights by maintaining a policy or custom of inadequate medical care for inmates in the jail did not meet the requirements we established for such a claim in *Spell v. McDaniel.* [FN6] In *Spell,* we stated that a viable claim of municipal liability under 42 U.S.C. § 1983 can only arise "'when execution of a government's policy or custom'" results in the injury alleged. [FN7] In addition, we held that the execution of a policy or custom that is not unconstitutional on its face must be more than merely negligent. Rather, it must be at least deliberately indifferent to or undertaken with reckless disregard for the constitutional rights of the person who was allegedly injured. [FN8]

Here, we agree with the district court's conclusion that, "[e]ven viewed in the light most favorable to [Susan], the evidence in the record does not demonstrate that the conduct of Richland County rose to the level of deliberate indifference or reckless disregard, nor does it demonstrate the 'persistent and widespread' practice [of the policy or custom] required to invoke . . . municipal liability." [FN9] In

attempting to prove that the "policy or custom" that allegedly resulted in Carl's death was "widespread," Susan introduced only the testimony of Linda Byrd ("Byrd"), who had worked as a nurse in the jail. However, Byrd's testimony never touched on the gravamen of Susan's first allegation against Richland County--that it did not provide medical care for inmates by following physicians' orders. Rather, Byrd's testimony was only that inmates were not being seen at times by physicians, [FN10] which is undisputably not the case here.

In addition, as Byrd's testimony focused only on the practices of medical personnel other than Eskridge, we agree with the district court's conclusion that it was insufficient to show any causal connection between the allegedly widespread policy or custom and Carl's death. Further, as the district court also found, even if Byrd's testimony pertained to the substance of Susan's first allegation and offered evidence of a causal connection between that allegation and Carl's death, there is nothing in Byrd's testimony that indicates that the problems she described were "'so permanent and well-settled as to [have] the force of law,'" [FN11] and thus, represented actionable policies or customs.

Therefore, we agree with the district court's conclusion that Susan failed to offer any evidence that might support a finding of liability on the part of Richland County in this regard. Accordingly, we affirm the district court's grant of summary judgment on this allegation.

We also affirm the district court's grant of summary judgment to Richland County on Susan's claim that the County's policy of ordering medication for the jail to be delivered the next day was deliberately indifferent to or undertaken with reckless disregard for the constitutional rights of prisoners. As the district court noted, it is undisputed that it was Eskridge who decided that Carl did not need to begin taking Librium immediately. Had

Eskridge decided otherwise, the jail presumably could have obtained the prescription quicker. However, as jail officials are generally entitled to rely on a physician's decision regarding care for a prisoner, [FN12] there was no policy or custom that caused Carl's death. Rather, if Carl's death can be attributed to the fact that he did not begin taking Librium on October 17, then the only person who could be held liable in this regard is Eskridge, who, in his professional judgment, determined that Carl could wait until the next day to begin receiving the drug. As we discuss below, such potential malpractice is not actionable under § 1983.

With regard to Susan's allegation that Richland County should be held liable for the failure of McCauley, the jail's director, to implement certain detoxification and medical treatment policies and to ease the problem of overcrowding at the jail, we agree with the district court's conclusion that Susan has offered no evidence that "any of these proposed policies would have prevented Carl Jinks['s] death, [or that they were] constitutionally required." [FN13] As the district court concluded, this allegation is largely speculative and makes virtually no appeal to any standards that might form the basis for an action under § 1983. In fact, as the district court noted, the only standards to which Susan appeals are South Carolina state standards, [FN14] which, as standards grounded in state law, cannot form the basis for an allegation that federal constitutional rights were violated under color of state law. [FN15] Therefore, we affirm the district court's grant of summary judgment on this allegation.

We also affirm the district court's finding that Susan presented no triable issue of fact regarding supervisory liability on McCauley's part. To be subject to supervisory liability under § 1983, it must be shown that: (1) McCauley had actual or constructive knowledge of the allegedly unconstitutional actions; (2) McCauley tacitly approved of or was deliberately indifferent to those actions; and (3) that there was an affirmative causal link between McCauley's

failure to correct the situation and the injury alleged. [FN16]

However, as we have found that Susan failed to present any evidence regarding the existence of unconstitutional actions in the jail, we need not address the question of whether McCauley can be subject to supervisory liability for those alleged actions. Accordingly, we affirm the district court's grant of summary judgment to McCauley on this allegation.

Finally, we decline to disturb the district court's grant of summary judgment to Eskridge on Susan's allegation that Eskridge violated Carl's Eighth Amendment rights by providing negligent care and treatment that resulted in Carl's death. This issue was not specifically discussed in the district court's memorandum. However, alleged medical malpractice does not rise to the level of a constitutional violation simply because the victim is a prisoner. [FN17] With this principle in mind, we find no triable issues in Susan's allegations in this regard. Accordingly, we agree with the district court's conclusion that summary judgment was warranted on this allegation.

For these reasons, we affirm the district court's order granting summary judgment in its entirety. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court, and argument would not aid the decisional process.

AFFIRMED

FN1. J.A. at 405.

FN2. *Id.*

FN3. *Id.* at 103.

FN4. *Id.* at 104.

FN5. *See M & M Med. Supplies v. Pleasant Valley Hosp.,*

981 F.2d 160, 163 (4th Cir.1992).

FN6. 824 F.2d 1380 (4th Cir.1987).

FN7. *Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir.1987) (quoting *Monell v. Department of Soc. Servs. of New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)).

FN8. *See id.* at 1390-91.

FN9. J.A. at 780 (quoting *Spell*, 824 F.2d at 1386).

FN10. *Id.* at 516.

FN11. *Spell*, 824 F.2d at 1386 (quoting *Monell*, 436 U.S. at 691) (internal citation omitted).
FN12. *See Miltier v. Beorn*, 896 F.2d 848, 854 (4th Cir.1990).

FN13. J.A. at 783 (citations omitted).

FN14. Appellant's Br. at 24.

FN15. *See, e.g., Baker v. McCollan*, 443 U.S. 137, 146, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979).

FN16. *See Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir.1994) (citations omitted).

FN17. *See Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

163 F.3d 598 (Table)(4th Cir.(S.C.)), Unpublished Disposition

D. Order of the U.S. District Court for the District of South Carolina, Columbia Division (December 1997)

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Susan Jinks, Individually and Susan Jinks as Personal Representative of the Estate of Carl H. Jinks,	)Case No.: 3:96-1650-10
Plaintiff,	)ORDER
vs.	
James McCauley, Richland County, Gurnie Bell, Jane Doe, John Doe and Dr. Charles Eskridge,	
Defendants.	

This Court previously entered an Order on November 20, 1997, granting summary judgment to the Defendants James McCauley, Richland County, and Dr. Charles Eskridge only as to the federal claims brought pursuant to Title 42, U.S.C. § 1983. The two separate November 20, 1997, Orders did not address Plaintiff's pendent State claims. Since all federal claims in this action have been resolved, this Court declines

to exercise jurisdiction over the remaining state claims pursuant to United Mine Workers v. Gibbs, 383 U.S. 715 (1996).

Therefore, this Court hereby dismisses Plaintiff's pendent State claims without prejudice pursuant to 28 U.S.C. § 1367 (C)(3).

IT IS SO ORDERED.___

Hon. Matthew J. Perry /s/
The Honorable Matthew J. Perry
Senior U.S. District Judge

Columbia, South Carolina

December 3, 1997

E. Opinion of the First Circuit Court of Appeals in *Brown v. City of Boston*, 98 F.3d 1333 (1st. Cir 1996)(table)(per curiam)(unpublished), 98 F.3d 1333

United States Court of Appeals, First Circuit.
Barry BROWN, Plaintiff, Appellant,
v.
CITY of Boston, et al., Defendants, Appellees.
No. 96-1074.
Oct. 15, 1996.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Edward F. Harrington, U.S. District Judge]

D.Mass.
AFFIRMED.
Elliott Fine and Elliott Fine and Associates on brief for appellant.

John M. Townsend, General Counsel, Joan T. Kennedy, Assistant General Counsel, Merita A. Hopkins, Corporation Counsel, and Kevin S. McDermott, Assistant Corporation Counsel, on brief for appellees.

Before TORRUELLA, Chief Judge BOUDIN and LYNCH, Circuit Judges.

PER CURIAM.
Upon careful review of the briefs and record, it clearly appears that this appeal presents no substantial question, and we perceive no reason to reverse the judgment from which plaintiff appeals.
Specifically, we agree with the district court that plaintiff's allegations of negligence were insufficient to state a federal claim. See Daniels v. Williams, 474 U.S. 327, 331-33 (1986) (no constitutional due process claim was stated against prison officials for "negligent failure to protect"); Manarite v.

City of Springfield, 957 F.2d 953, 957-59 (1st Cir.) (dismissing s 1983 claims where police did not act with "deliberate indifference"), cert. denied, 506 U.S. 837 (1992). Even plaintiff's sketchy claim of harassment by the prison staff was grounded in the same insufficient allegations of negligence underlying the rest of his complaint. On that basis, the district court properly determined that defendants were entitled to judgment on any federal claims.

The district court also properly determined that it would not exercise pendent jurisdiction over any remaining state claims, once the federal claims were dismissed. See 28 U.S.C. s 1367(c)(3) (district court may decline supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction); Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 (1988) (district court has discretion to retain or dismiss the remaining state claims, upon consideration of factors such as comity, judicial economy, convenience, and fairness); Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249, 257 (1st Cir.1996) (same). No abuse of that discretion is apparent here. Although plaintiff may have preferred a remand to the state court, in light of the tolling provision of 28 U.S.C. s 1367(d), he was not harmed by the dismissal. See Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 48 F.3d 1260, 1267 (D.C.Cir.1995) (s 1367(d) tolls the state statute of limitations on any state claim over which a federal court has exercised supplemental jurisdiction until 30 days after its dismissal and thus reduces the concern that plaintiffs would lose their claims if their case were dismissed). We note that, while this appeal was pending (and without following the procedure set forth in Puerto Rico v. SS Zoe Colocotroni, 601 F.2d 39, 42 (1st Cir.1979)), plaintiff asked the district court to vacate the judgment of dismissal and remand the case to the state court. Plaintiff apparently believed that the statute of limitations had expired on his dismissed state law claims and that he could not refile them in state court. By orders dated July 16, 1996, the district court granted plaintiff's motions and remanded the case. Defendants have moved for reconsideration or clarification of those orders, but the district court has not yet

acted on that motion. In other words, the district court has purported to vacate the very judgment that is now before us on appeal.

For the purpose of this appeal, we consider the July 16, 1996, orders to be nullities. See Toscano v. Chandris, 934 F.2d 383, 387 (1st Cir.1991) (giving no effect to orders entered without compliance with the Colocotroni procedure; "[i]f courts did not demand that litigants recognize and respect jurisdictional borders, the judicial system would be adrift in a sea of competing decrees and duplicative proceedings"). Once our mandate issues, however, the district court may act on plaintiff's post-judgment motions and defendants' motion for reconsideration. Should either party desire to appeal from any such subsequent rulings, a separate notice of appeal must be filed. The judgment appealed from is affirmed, and appellees' motion to be heard at oral argument is denied.

98 F.3d 1333 (Table)(1st Cir.(Mass.)),
Unpublished Disposition

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Necessary and Proper Clause, the Supremacy Clause, the Third Article, the Fifth Amendment, the Tenth Amendment, and the Fourteenth Amendment to the United States Constitution are reproduced below.

> The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art I, cl. 18.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. CONST. art VI, cl. 2.

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good

> Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend V.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend X.

> Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

28 U.S.C. § 1367. Supplemental jurisdiction is reproduced below.

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be

inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if -

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 U.S.C. § 1367.

The relevant provisions of the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.* (Supp. 2001) are reproduced below.

> SECTION 15-78-40. Tort liability of State, agency, political subdivision, or governmental entity, generally.
>
> The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.

S.C. Code Ann. § 15-78-40.

> SECTION 15-78-110. Statute of limitations.
>
> Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

S.C. Code Ann. § 15-78-110.